Bremerton Sun Publishing Co. *and* Communications Workers of America, Local 14761, affiliated with Communications Workers of America, AFL–CIO, CLC. Case 19–CA–21190

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The single issue presented in this case is whether the Respondent's insistence to impasse on a proposal to delete a section of the Recognition and Jurisdiction Article that had been contained in the parties' previous contracts amounted to an insistence on altering the scope of the bargaining unit and thereby violated Section 8(a)(5) of the Act. For the reasons set forth below, we agree with the administrative law judge that the Respondent did so violate the Act.[1]

On August 5, 1992, the Board scheduled oral argument in this case and in *Antelope Valley Press*,[2] issued this same day, because they presented important issues in the administration of the Act. On September 10, 1992, the Respondent, the General Counsel, and the Charging Party presented oral argument before the Board. The Newspaper Association of America and the American Federation of Labor and Congress of Industrial Organizations filed briefs as amici curiae.

The Board has considered the decision and the record in light of the exceptions, briefs, and oral argument and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified.

I. FACTUAL BACKGROUND

The Union has been the exclusive collective-bargaining representative of a unit of Respondent's employees since at least 1960, and the Union and the Respondent have entered into successive collective-bargaining agreements. The parties' most recent collective-bargaining agreement, effective from March 1, 1984, to February 28, 1987, contains the following provisions:

ARTICLE I

RECOGNITION AND JURISDICTION

> Section 1. The Employer hereby recognizes the Union as the exclusive bargaining representative of all employes covered by this Agreement. The words ''employe'' and ''employes'' when used in this contract apply to journeymen and apprentices.
>
> . . . .
>
> Section 3. Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate collective bargaining unit consists of all employees performing any such work.

The above provisions have been contained in each of the parties' collective-bargaining agreements as article I, sections 1 and 3, since at least the parties' agreement effective from March 1, 1976, to February 28, 1978.

A. *The Supplemental Agreement Negotiated in 1978*

During the parties' negotiation of a new contract to succeed the one expiring on February 28, 1978, the Respondent proposed, inter alia, to delete article I, section 3.[3] In its place, the Respondent proposed provisions which would, inter alia, allow it to utilize new technology coming into use in the newspaper industry. The Union rejected the Respondent's proposal and the parties ultimately entered into a supplemental agreement along with a new collective-bargaining agreement effective from March 1, 1978, to February 28, 1981.

Under the heading ''WORK ARRANGEMENT,'' the supplemental agreement permitted the Respondent to utilize, in certain specified circumstances, employees outside the bargaining unit to perform by electronic technology work which had theretofore been performed exclusively by the bargaining unit employees pursuant to article I, section 3. Thus, for example, it stated that classified ads, with certain specified exclusions, could be ''keyboarded in the classified advertising department'' and that employees in the editorial department could perform keyboarding required in the process of editing wire service and syndicated copy that was initially received by the Respondent's computers. The agreement provided that the specified work arrangements would begin effective with the installation of specified new equipment, and it set forth its relation to the main collective-bargaining agreement as follows:

> (j) In any case of disagreement, inconsistency or disparity between this Agreement and the main Agreement, this Agreement shall prevail.

[1] On September 10, 1991, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs in response to the Respondent's exceptions. The Respondent thereafter filed a reply brief.

[2] 311 NLRB No. 50.

[3] The judge inadvertently found that the Respondent additionally sought to delete art. I, sec. 1. This is incorrect. This inadvertent error does not affect the result in this case.

The supplemental agreement also provided for lifetime employment until age 70 for 22 named employees.[4]

B. *Expiration of the Most Recent Collective-Bargaining Agreement*

Upon expiration of the parties' most recent collective-bargaining agreement on February 28, 1987, the parties met on 32 occasions in an attempt to negotiate a new agreement. The parties stipulated that impasse was reached on August 22, 1990, on which date the Respondent made its final offer. As here relevant, the Respondent's final offer provides:

ARTICLE I

RECOGNITION AND JURISDICTION

SECTION 1:

No change in first paragraph.

. . . .

SECTION 3:

Revise to read as follows:

The jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading).

. . . .

Delete the Work Arrangement provision of the old supplemental agreement. In its place, substitute the following:

1. The Employer does not intend with this new provision to modify the definition of the bargaining unit.

2. The Employer does not intend with this new provision to modify the definition of the Union's jurisdiction.

3. The Employer reserves the right to determine how much of the work within the jurisdiction of the Union is to be performed by bargaining unit members.

4. The Employer reserves the right to assign work within the jurisdiction of the Union to any individual including non-employees. This right includes the right to assign work within the jurisdiction of the Union to any person when that work assignment is in conjunction with the introduction of any new equipment.

As the Respondent's proposal makes clear, the Respondent sought to delete the clause in article I, section 3 which states, ''[A]nd the appropriate collective bargaining unit consists of all employes performing any such work.''

[4] The judge found that the lifetime employment provision was the quid pro quo for the work arrangement provision in the supplemental agreement.

II. DISCUSSION

A. *Introduction*

The Respondent concedes in its brief that ''the scope of a bargaining unit is a permissive subject of bargaining,'' and that no party to a collective-bargaining relationship may lawfully ''insist to impasse on modifying the unit definition.'' Further, it does not claim that it would be free to insist on a collective-bargaining agreement that contained no definition of the recognized unit. In making these concessions, the Respondent does no more than acknowledge what existing law plainly requires.[5]

In contending that its insistence on its proposal for the Recognition and Jurisdiction Article was lawful, the Respondent essentially argues that the 1978 supplemental agreement operated to rescind section 3 of article I in the then-existing collective-bargaining agreement, and make section 1 of article I the sole operative definition of the bargaining unit. The continued appearance of section 3 in subsequent agreements, the Respondent explains, was purely for ''historical purposes.'' Thus, according to the Respondent, its proposal to delete section 3 was not an insistence on *modifying* the unit description but merely an embodiment of what the parties had already agreed on as to unit scope.

Through its counsel at the oral argument in this case, the Respondent advanced another theory. It argued that its proposal for article I was intended solely to address work assignments and was not an effort to affect the unit placement of any employees to whom work ''within the jurisdiction of the Union'' was assigned. Rather, the Respondent maintained, it would willingly recognize the Union as the representative of any employees to whom such work was assigned upon an appropriate determination by the Board in a unit clarification proceeding.

We find no merit in the Respondent's contentions because, as explained below, (1) the record does not support its contentions concerning the significance of the 1978 supplemental agreement; (2) article I, section

[5] See, e.g., *Standard Register Co.*, 288 NLRB 1409, 1410 (1988) (insistence to impasse on deletion of unit description language from contract violates Sec. 8(a)(5) and (1)); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 551 (1973), enfd. in relevant part 495 F.2d 1384 (8th Cir. 1974) (bargaining representative is entitled to have description of the appropriate unit embodied in the contract). In *Antelope Valley Press*, 311 NLRB No. 50, the Board has set forth a new framework for resolving cases in which the issue is whether a party's insistence on a proposal referring to types of work amounts to an insistence (1) on alteration of unit scope (a nonmandatory subject of bargaining on which insistence to impasse is unlawful) or (2) on the alteration of work assignments (a mandatory subject on which insistence to impasse is lawful). The Board has not, however, disturbed the basic proposition that a party may not insist to impasse on a contract that would contain no meaningful description of the bargaining unit to which the contract terms were to apply.

1 does not, by itself, constitute a description of a bargaining unit; and (3) the statements and proposals of the Respondent could not reasonably be construed as indicating that it would be amenable to treating employees formerly outside the unit as unit employees after it had reassigned work within the unit description to them.

B. *The 1978 Supplemental Agreement Modified the Unit Description in Article I, Section 3 but did not Rescind it*

Prior to the introduction of the supplemental agreement in 1978, the scope of the bargaining unit was plainly set forth in article I, section 3 of the collective-bargaining agreement effective from March 1, 1976, to February 28, 1978:

> Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and *the appropriate bargaining unit consists of all employes performing any such work*. [Emphasis added.]

The language of this provision makes plain that the Union's unit description and its work jurisdiction were not separated in the collective-bargaining agreement but were both interconnected in section 3 of article 1. Further, the language makes clear that the type of work performed defines who is in the bargaining unit.

All of the parties, including the Union and the General Counsel, agree that the work arrangement provisions set forth in the 1978 supplemental agreement did have the effect of modifying the bargaining unit set forth in section 3 of article 1. Thus, they acknowledge that the unit does not include classified ad employees, news department employees, and editorial employees even when these employees are performing duties described in the supplemental agreement that are part of the flow of work between ''the markup of copy'' and the emergence of material ''ready for the printing press.'' Prior to the execution of the supplemental agreement, employees performing such work would clearly be within the agreed-upon bargaining unit. Because all the parties agree, and because this construction accords with the plain language of the document, we find that the bargaining unit set forth in section 3 of article I was modified by the parties' 1978 supplemental agreement.[6] Thus, when the parties engaged in their negotiations under scrutiny here, the existing bargaining unit was that set forth in section 3 of article I as modified by the work arrangement provisions in the parties' supplemental agreement.

As noted above, however, the Respondent contends that the supplemental agreement went beyond mere modification, and actually *rescinded* article I, section 3 and the unit description contained therein. The Respondent reasons that the provision in article I, section 3 establishing that the bargaining unit is composed of all employees performing any work between the markup of copy until ready for the printing press is inconsistent with the Work Arrangement set forth in the supplemental agreement, which permits nonunit employees to perform tasks between the work jurisdictional pillars defining the unit in article I, section 3. Given this inconsistency between article I, section 3 and the supplemental agreement, the Respondent argues that pursuant to paragraph (j) of the supplemental agreement, the latter prevails and accordingly rescinds and renders inoperative section 3 of article I.[7]

The Respondent recognizes, however, that a serious impediment to its argument is the reappearance of the supposedly rescinded section 3 in the versions of article I contained in subsequent collective-bargaining agreements, including the 1984–1987 agreement, which was the predecessor of the agreement that was the object of the negotiations giving rise to the unfair labor practice charge in this case. The Respondent's answer is that this was included only for ''historical'' purposes and not as a definition of unit scope. In support of this proposition, the Respondent cites the testimony of Arland Lofton, its general manager, who was a member of the Respondent's 1978 negotiating team. Loften testified that the Respondent agreed to retain article I, section 3 only because of its belief that it was rendered nugatory by paragraph (j) of the supplemental agreement.

We reject, as did the judge, the Respondent's construction of the 1978 contract to mean that paragraph (j) of the supplemental agreement rescinded entirely the bargaining unit description contained in article I of section 3. First, we find no fatal inconsistency between the supplemental agreement and section 3 of article I since, as stated above, we find that the former simply

[6] We therefore do not adopt the judge's rejection of the General Counsel's and the Union's concession that the bargaining unit was so modified and his concomitant finding that the supplemental agreement did not change the bargaining unit. We shall modify the judge's conclusions of law, remedy, and recommended Order to reflect the description of the appropriate bargaining unit as found here.

Further, we do not adopt the judge's characterization of the work arrangement provisions of the supplemental agreement as a ''temporary concession'' by the Union. While we need not definitively characterize the work arrangement provisions, the technological advances that led to them suggest they may not be temporary.

[7] The Respondent has excepted to the judge's ruling precluding the Respondent from presenting additional evidence that art. I, sec. 3 is inconsistent with the supplemental agreement and that the former is accordingly not an operative unit description. To the extent the Respondent desired to elicit additional evidence of tasks between markup of copy and printing that were performed by nonunit employees pursuant to the 1978 supplemental agreement, we find that the Respondent was not prejudiced by the judge's ruling. Other evidence already admitted amply demonstrates that the supplemental agreement permitted employees in the designated nonunit departments to perform such tasks.

modified the latter. Second, the supplemental agreement provides under the title, Work Arrangement, that effective with the installation of new technology, the Work Arrangement shall be as set forth therein. By its express terms, therefore, the supplemental agreement purports only to modify Work Arrangements as there set forth and contains no language whatsoever suggesting an intent to rescind any article of the contract. Paragraph (j) merely indicates, as the judge reasoned, that any disputes over the specific categories of work described in the supplemental agreement would be governed by that agreement and not by the main agreement. It does not purport to affect the outcome of matters not covered in the supplemental agreement.

Nor can the parol evidence of General Manager Lofton fill the gap. Lofton did not testify that he or any other agent of the Respondent ever informed the Union of the Respondent's alleged understanding that section 3 of article I was completely rescinded by operation of the supplemental agreement and would be retained only as some kind of historical artifact. Hence, his testimony at best establishes the Respondent's private view. It does not confirm any such mutual understanding of the parties as to the effect on article I, section 3.[8]

There is, in fact, affirmative evidence that section 3 of article I was not rescinded in 1978. The continued vitality of article I, section 3 is established by evidence that certain tasks which were performed by bargaining unit employees pursuant to that provision prior to the 1978 supplemental agreement continued to be performed by unit employees after the enactment of the supplemental agreement, e.g., platemaking, page makeup, and display advertising copy including classified display ads (not received ready for pasteup or camera ready).[9] Accordingly, the bargaining unit description in article I, section 3 defining the unit in terms of work performed remained effective in defining bargaining unit work and therefore cannot be considered to have been rescinded.

[8] To the extent the Respondent's exceptions protest its preclusion from eliciting additional evidence regarding the negotiation of the 1978 supplemental agreement to support its argument that art. I, sec. 3 was retained merely for historical purposes, the Respondent failed to make an offer of proof in this regard either at trial, in its brief to the Board, or at oral argument. In the absence of an offer of proof detailing proposed evidence which, if credited, would warrant a different result, we decline to find that the judge erred by precluding such evidence or to remand for further evidence.

[9] Respondent's general manager Lofton testified that union members currently perform these tasks. The Respondent has excepted to the judge's overruling of its objections at trial to questions by the Union's counsel assertedly calling for legal conclusions from Lofton on cross-examination. We find that the Respondent was not prejudiced by the judge's ruling; we cite Lofton's testimony solely for the proposition that union members currently perform the enumerated tasks, and not for any asserted legal conclusions elicited from him.

C. *Insistence on Article I, Section 1 as the Unit Description is Effectively an Insistence on Having no Unit Description*

Even were we to accept the Respondent's contention that the parties had agreed that section 3 of article I would no longer serve as any guidance as to who was in the bargaining unit, we would still face the problem that the proposal on which the Respondent was insisting contains no adequate definitional language to take the place of the supposedly rescinded section. In this regard, we cannot accept the Respondent's argument that article I, section 1, which the Respondent did not seek to change, would now supply the unit description.

Article I, section 1 manifests the Respondent's recognition of the Union as the exclusive collective-bargaining representative of all ''employees'' covered by the agreement, and adds that ''employees'' refers to ''journeymen and apprentices.'' Section 1 of article I does not, however, supply a definition of who those journeymen and apprentices are, whether by job classification, department, task performed, or otherwise. That definition as to who unit journeymen and apprentices are is set forth in article I, section 3, as modified by the 1978 supplemental agreement, which explicitly defines the appropriate collective-bargaining unit. Accordingly, we find that the Respondent's contention that section 1 of article I describes the scope of the bargaining unit amounts to an admission that the Respondent was insisting on having no meaningful unit definition at all in the collective-bargaining agreement. This is a violation of Section 8(a)(5) of the Act, because a collective-bargaining representative is ''entitled to have . . . the unit it represent[s] incorporated in any contract reached by the parties.'' *Columbia Tribune Publishing Co.*, supra, 201 NLRB at 551.

D. *Because of the Deletion of the Unit Description, the Respondent's Proposal was not Limited to Work Assignments*

In *Antelope Valley Press*, supra, the case consolidated with this proceeding for oral argument, the Board has formulated a new test for determining under what circumstances, if at all, a party may lawfully insist to impasse on changes in work assignments when the previously agreed-upon bargaining unit description is based on descriptions of work performed. The Board there held that when unit descriptions are couched in those terms, an employer may, after reaching impasse, insist on transferring work of a type contained within the description to employees other than those currently performing it. The employer may not, however, either change the unit description itself or insist that nonunit employees to whom the work is transferred will remain outside the unit. The unit placement of such employees may be determined by the Board either in an unfair

labor practice proceeding or a unit clarification proceeding.

At oral argument in this case, the Respondent's counsel sought to bring the Respondent within that rule by contending that the Respondent's proposal was merely a work assignment proposal and was not aimed at affecting unit composition at all, since the Union would be free to claim that those to whom work was reassigned were now within the unit, ''and the Board would look at the same kinds of community of interest factors they would always look at in a UC proceeding.''[10]

The Union's counsel took issue not with the legal theory but with the Respondent's description of its proposal. He argued that the proposal assumed that the people to whom work was reassigned would ''not be bargaining unit members.''[11] In his view, what the Respondent was seeking, at least in part, was that when it made an assignment of what was once unit work to persons outside the unit, ''they are not going to have to deal with us, the [U]nion.''[12]

We find merit in the Union's position. Notwithstanding the statement in the Respondent's proposal that ''the Employer does not intend with this new provision to modify the definition of the bargaining unit,'' it is apparent that the proposal was based on an assumption, which the Respondent has continued to press in this proceeding, that the unit definition as set out in article I, section 3 no longer existed at all. Thus, even assuming the Respondent might have been willing to accede to a unit clarification proceeding for determining the unit placement of employees to whom what was formerly bargaining unit work was assigned, the Respondent was clearly insisting that any such placement determination be made according to some standard other than the language of article I, section 3 as modified by the specific exclusions of the supplemental agreement. Thus, unlike the employer in *Antelope Valley*, who neither proposed a change in the contractual unit description nor insisted that it existed only for ''historical purposes,'' the Respondent was insisting to impasse on a change in article I, section 3 which effectively amended the description of the unit in what we have determined was the agreed-upon unit description after the 1978 modification.[13] Thus, under both the Board's earlier case law (see fn. 5, supra) and our new test, the Respondent has violated Section 8(a)(5) and (1) of the Act by its proposal.

[10] Tr. of oral argument at p. 94.

[11] Id. at 82.

[12] Id. at 113.

[13] The instant case is distinguishable from *Storer Communications*, 295 NLRB 72 (1989), affd. 904 F.2d 47 (D.C. Cir. 1990), relied on by the Respondent, for the same reason. In *Storer*, the employer's impasse proposal preserved the unit description of the expired contract.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3.

''3. Communications Workers of America, Local 14761, affiliated with Communications Workers of America, AFL–CIO, CLC is the exclusive collective-bargaining representative of the following appropriate unit pursuant to Section 9(a) of the Act:

> All of Respondent's employees performing any work between the markup of copy and continuing until the material is ready for the printing press (but excluding proofreading), as modified by the work arrangement provisions in the parties' supplemental agreement.''

REMEDY

The Respondent shall, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate bargaining unit is:

> All of Respondent's employees performing any work between the markup of copy and continuing until the material is ready for the printing press (but excluding proofreading), as modified by the work arrangement provisions in the parties' supplemental agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bremerton Sun Publishing Co., Bremerton, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement:

> All of Respondent's employees performing any work between the markup of copy and continuing until the material is ready for the printing press (but excluding proofreading), as modified by the work arrangement provisions in the parties' supplemental agreement.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain in good faith with Communications Workers of America, Local 14761, affiliated with Communications Workers of America, AFL–CIO, CLC by insisting to impasse on changing the scope of the bargaining unit as a condition for a new collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement. The bargaining unit is:

> All of Respondent's employees performing any work between the markup of copy and continuing until the material is ready for the printing press (but excluding proofreading), as modified by the work arrangement provisions in the parties' supplemental agreement.

BREMERTON SUN PUBLISHING CO.

S. Nia Renai Cottrell, for the General Counsel.
Jeremy P. Sherman, Jeffrey C. Kauffman (Seyfarth, Shaw, Fairweather & Geraldson), on brief, of Chicago, Illinois, for the Respondent.
Richard Rosenblatt, of Englewood, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Seattle, Washington, on April 23, 1991, on a complaint issued by the Regional Director for Region 19 of the National Labor Relations Board on December 6, 1990. The complaint is based on a charge filed by Communications Workers of America, Local 14761, affiliated with Communications Workers of America, AFL–CIO, CLC (the Union) on October 29, 1990. It alleges that Bremerton Sun Publishing Co. (Respondent) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act.

Issues

The principal issue is whether Respondent's bargaining proposal, on which the parties have come to impasse, is an effort to change the bargaining unit description or whether it is only a proposal to change the work jurisdiction of the employees in the bargaining unit. If it is the former, the conduct violates Section 8(a)(5) and Section 8(d) of the Act; if not, the conduct is lawful.

All parties have filed briefs which have been carefully considered. As the matter presented is primarily a legal issue, credibility is not a concern although two witnesses did give testimony. Based on certain stipulations, the testimony and the exhibits, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits it is a State of Washington corporation with an office and place of business in Bremerton, Washington, where it is engaged in the publication of a daily newspaper, The Bremerton Sun. It further admits that in the course of its business it meets the Board's jurisdictional standards applicable to daily newspapers and is therefore an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Union, through predecessors, has been the exclusive collective-bargaining representative of Respondent's composing room employees since at least 1960, and perhaps as long as 1940. The parties' stipulation on the subject only went to 1960, though the complaint asserted 1940. In any event, the representation period is extensive. The Union also represents, in a separate unit, certain editorial department employees. They are not involved in this action.

The most recent collective-bargaining agreement between the parties was from March 1, 1984, to February 28, 1987. The parties have been engaged in bargaining over a new contract since its expiration. Robert Haggbloom, the Union's secretary-treasurer (chief executive officer) testified that up through August 22, 1990, the parties had met unsuccessfully on 32 occasions. On that date Respondent made the final offer which is under scrutiny here. A 33rd and last meeting was held on February 22, 1991, but the parties' respective positions did not change. At the hearing, all parties stipulated that an impasse had occurred on August 22, 1990.

Respondent would not admit that the collective-bargaining unit described in the complaint was either an appropriate unit or that it accurately described the unit. It does agree that the unit is described in the expired collective-bargaining contract. That, however, is the crux of the matter.

The expired agreement actually consists of two documents, a main agreement (G.C. Exh. 2(a)) and a supplemental agreement (G.C. Exh. 2(b)). Until 1978 there was no supplemental agreement. The language describing the bargaining unit until that time was, of course, found in the agreement itself. Indeed, the unit description language has been the same since at least the 1976–1978 contract (R. Exh. 1). It, the 1978–1981 main contract (R. Exh. 2) and the last main contract,

for 1984–1987, all contain the same clauses which assertedly comprise the bargaining unit description. The language is:

> Article I—Recognition and Jurisdiction
>
> Section 1. The Employer hereby recognizes the Union as the exclusive bargaining representative of all employes covered by this Agreement. The words ''employe'' and ''employes'' when used in this contract apply to journeymen and and apprentices.
>
> . . . .
>
> Section 3. Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate collective bargaining unit consists of all employes performing any such work.

In 1978, with the advent of the supplemental agreement, language appeared which has now given rise to Respondent's contention that the bargaining unit is actually something other than that described in article I, sections 1 and 3. Initially, in 1978, Respondent had proposed to delete article I, sections 1 and 3 and substitute language which would have changed the jurisdiction, allowing full use of new technology; yet it offered no substitute for the recognition clause. At the Union's suggestion, the parties decided to deal with the changing jurisdiction problems created by the new technology in a supplemental agreement. The supplemental agreement was designed to allow the Employer to utilize, in certain specific circumstances, employees outside the unit to perform by electronic technology, work which had historically been performed by the bargaining unit employees. Some of that was designed to eliminate so-called ''bogus'' work, i.e., unnecessarily doing work twice. The quid pro quo for that agreement was lifetime employment until age 70, guaranteed against reductions in force, for 22 named employees.

The ''work arrangement'' portion of the supplemental agreement permitted Respondent to skip composing room work in listed circumstances. It allowed some classified advertising to be directly keyboarded by employees in the classified ad department; it permitted news and editorial department employees to directly keyboard their copy and it permitted other specified ''markup'' work to be performed in the newsroom.[1] Recognizing that these changes seemed facially to conflict with the article I, section 3 language (''Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press. . .'') the parties included a ''dominance'' clause in the supplemental agreement, paragraph (j), which states: ''In any case of disagreement, inconsistency or disparity between this [Supplemental] Agreement and the main Agreement, this [Supplemental] Agreement shall prevail.'' That stood until 1990.

Respondent's August 22, 1990 proposal left the recognition language of article I, section 1 of the main agreement intact. However, with respect to section 3, it proposed to omit the language which reads: '' and the appropriate collective bargaining unit consists of all employes performing any such work.'' As proposed and as rejected, the new section 3 would read, in its entirety: ''Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading).'' It also proposed to add two new sections to the supplemental agreement. Proposed paragraph 3 reads: ''The Employer reserves the right to determine how much of the work within the jurisdiction of the Union is to be performed by bargaining unit members.'' Offered paragraph 4 states: ''The Employer reserves the right to assign work within the jurisdiction of the Union to any individual, including non-employees. This right includes the right to assign work within the jurisdiction of the Union to any person when that work assignment is in conjunction with the introduction of any new equipment.'' (G.C. Exh. 3, pp. 2–3.) These two clauses were preceded by proposals 1 and 2 which claimed the changes were not intended to modify the definition of either the bargaining unit or the Union's work jurisdiction.

Respondent's general manager Arland Loften testified that the purpose of the ''exceptions'' (set forth in the original supplemental agreement) was to ''allow[] us to continue with the technology, or at least some of it that was available at the time—the exceptions in the supplemental agreement.''

With respect to the 1990 proposal, Loften agrees that the new language is designed toward using effectively and efficiently the new technology available to the printing industry, i.e., equipment now on the market but which Respondent has not yet acquired. He further testified:

> Q. [By Mr. Rosenblatt] And the proposal that the Employer has made in the current negotiations concerning the change in Article I, Section 3 and the changes in the supplemental agreement—isn't it correct that the purpose of these proposals was to give the Company flexibility to assign work or reassign work away from unit employees, the work we were just talking about?
>
> A. Yes.
>
> Q. And isn't it correct that the Employer, under their proposal, could do it at any time, at their will, without dealing with the Union? [Redundancy omitted.]
>
> A. Yes.
>
> Q. And so, isn't it correct that, with this proposal, that the Employer could then hire people in the advertising department—instead of hir[ing] people in the composing room, hire people in the advertising department to do display ads between markup of copy and being ready for the press? [Redundancy omitted.]
>
> A. Yes.
>
> Q. And the Employer could make these decisions unilaterally under its proposal. Isn't that correct?
>
> A. Yes.

It is quite apparent that these changes are without limit. The list of transferable work set forth in the previous supplemental agreements has been deleted in favor of total discretion resting solely with Respondent.

IV. ANALYSIS AND CONCLUSIONS

This is another in a growing line of cases in the printing industry where craft bargaining units face erosion by virtue

[1] ''Markup'' work is the first step taken by a composing room worker in preparing copy to be prepared for the press. It was described by both witnesses as ''sizing the type to fit a given area.'' Electronic advances, including computers, have made it easy for persons other than composing room employees to do that work.

of modern computer technology. On the one hand the Employer is attempting to reduce costs by taking advantage of the new equipment. It often refers to its desire to obtain the maximum ''flexibility'' of its employees. The Union, on the other hand, recognizing that the electronic age is overtaking its traditional craft work, with the concomitant loss of employment, resists, compromises, and tries to make the best of a bad situation.

When the 1978 contract was signed, the Charging Party believed it had struck a fair bargain in the face of that modernization threat. In exchange for guaranteed employment for certain named bargaining unit employees, it allowed Respondent to assign some of its traditional bargaining unit work to noncomposing room employees. This practice has been followed since that time. The technology, however, continues to advance and Respondent naturally continues to want to take advantage of it.

Respondent asserts that the supplemental agreement has wrought a change in the bargaining unit. I am not so certain. Its own general manager refers to the work described there as ''exceptions.'' That phrase suggests that the work remains bargaining unit work, but the Union has granted Respondent several exceptions to the rule that bargaining unit work be performed by bargaining unit employees. Whether that conclusion is correct cannot be fully determined on this record. Indeed, the Charging Party's brief seems to concede that the work was removed from the bargaining unit. Even so, that apparent concession is not binding on either me or the Board. Certainly the location of the language, found in a supplemental agreement and within a ''work arrangement'' clause, suggests that this entire matter is only a temporary concession which may end when the supplemental agreement ceases to be effective. Indeed, nothing prevents the Union from seeking to absorb the employees who do markup work outside the composing room.

Certainly, prior to 1978 and continuing through the last contract, the main agreement contained relatively familiar combination bargaining unit description and work jurisdiction clauses.[2] These are quoted above in article I, sections 1 and 3. Nothing in the supplemental contract implies that the work arrangement has superseded the main contract unit description language. I recognize that Respondent argues that the ''dominance'' clause, section (j), does so, but when read in proper context, it clearly does not. It refers only to any dispute which might arise with respect to work arrangement, i.e., work jurisdiction covered by the supplemental agreement which might be inconsistent with the main agreement. It simply cannot be said to subvert the bargaining unit description found in the main agreement. Nonetheless, Respondent makes that argument. In doing so, it asserts that the bargaining unit language of article I, sections 1 and 3 were ''rescinded'' by the supplemental agreement and that the retention of article I, sections 1 and 3 after 1978 was an inaccurate and obsolete description of what was actually occurring at the plant. Indeed, at one point, Respondent argued that the retention of those clauses after 1978 was for the purpose of giving the unit employees ''psychological comfort,'' nothing more. (Tr. 63.) Later, in its brief (at 17) Respondent says article I, sections 1 and 3 were retained ''purely for historical purposes.''

I cannot accept those arguments. Article I and its subsections before 1978 described the appropriate unit and continue to describe it today. The language is not mere window dressing; it is an integral requirement of the Act. Both Section 9(a) and Section 8(d) require it. Specifically, see *Columbia Tribune Publishing Co*., supra at 551 fn. 52 (1973), modified 495 F.2d 1384 (8th Cir. 1974), and the cases cited therein. (*McQuay-Norris Mfg. Co. v. NLRB*, 116 F.2d 748, 751 (7th Cir. 1940), cert. denied 313 U.S. 565 (1941), and *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525–526 (1941).) It is clear that the clause most fundamental to a collective-bargaining agreement is the one which describes the employee unit over whom the parties are obligated to bargain in good faith. *Douds v. Longshoremen ILA (New York Shipping Assn.)*, 241 F.2d 278, 282 (2d Cir. 1957) (''Parties cannot bargain meaningfully about wages and hours and conditions of employment unless they know the unit for bargaining''). Also *Newspaper Printing Corp*., 250 NLRB 1144, 1148 (1980), enf. denied 692 F.2d 615 (6th Cir. 1982). For Respondent to argue in the face of that law that the article I, sections 1 and 3 language has only historical or psychological implications is absurd. Quite clearly the parties included that language in the collective-bargaining contracts subsequent to 1978 because it had vitality and meaning. It was the heart on which the remaining terms lived. Accordingly, Respondent's argument that those clauses had been rescinded is rejected.

The parties are in agreement, as they must be, that bargaining unit description clauses, sometimes called bargaining unit scope clauses, are nonmandatory bargaining subjects. *NLRB v. Southland Cork Co*., 342 F.2d 702, 706 (5th Cir. 1965); *Hess Oil & Chemical Corp. v. NLRB*, 415 F.2d 440, 445 (5th Cir. 1969), cert. denied 397 U.S. 916 (1970); *National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331, 1334 (5th Cir. 1978); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73 (4th Cir. 1979); *Bozzuto's, Inc*., 277 NLRB 977 (1985). As such, while the parties are permitted to bargain over changes in such clauses, they are not obligated to do so. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958). Indeed, it has been consistently held that it is a breach of the bargaining obligation mandated by Section 8(d) of the Act to insist to impasse over the modification or deletion of such clauses. E.g., *Idaho Statesman*, 281 NLRB 272, 277 (1986); *Boise Cascade Corp*., 283 NLRB 462, 468 (1987); *Standard Register Co*., 288 NLRB 1409, 1410 (1988).

In this particular case Respondent has proposed to eliminate the ''appropriate unit'' language of article I, section 3. On its face, therefore, we have a violation of Section 8(a)(5), for there would be no substitute language on which the parties would have agreed. It is true, that in one of its work arrangement proposals in its August 22 final offer, Respondent asserts that it ''does not intend with this new provision to modify the definition of the bargaining unit.'' Yet, that simply cannot be true. One cannot remove substantive and legally mandated bargaining unit language from the contract and in the same breath assert that there is no intent to change the bargaining unit description. These changes clearly had meaning and to suggest otherwise not only lacks logic, but is contrary to the evidence. One has only to look to General

[2] Combined unit description and work jurisdiction clauses are common in the printing industry. See *Columbia Tribune Publishing Co*., 201 NLRB 538, 551 (1973); *Newspaper Printing Corp*., 232 NLRB 291, 294 fn. 1 (1977).

Manager Loften's testimony that the purpose was to allow Respondent, if it wished, to unilaterally divert all the bargaining unit work to other, unrepresented, workers. By deleting the unit scope language, Respondent effectively deprives the Union of the protection of that clause and opens the door for Respondent to argue that the reassignment of work was either simply a matter of work jurisdiction or that the Union had waived any claim that it was bargaining unit work. To say that the unit would remain unchanged is idle talk and smacks of deceit.

Clearly Respondent sought not simply flexibility in assigning work, but ''unfettered discretion'' to assign the work anyway it saw fit without having to discuss and bargain with the Union over its ad hoc needs. This has uniformly been condemned by the Board for the reason that it undoes the Act. See *Newspaper Printing Corp*., 232 NLRB 291, 292 (1977), enfd. 625 F.2d 956 (10th Cir. 1980); *Standard Register Co*., supra at 1410; *Westvaco Corp*., 289 NLRB 301, 305 (1988). Compare *C & C Plywood Corp*., 148 NLRB 414 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965), revd. and remanded 385 U.S. 421 (1967). In that case the employer wanted to grant across-the-board wage increases by utilizing a merit increase clause aimed at benefiting only a few deserving employees. The Board and Supreme Court held that was a distortion of the clause and the employer was, in effect, arrogating to itself the sole right to determine wages., i.e., ''unfettered discretion.'' That undermined the union's status as the bargaining representative and thereby undid the Act's protection for employees. Similarly, Respondent here wishes to undo the Act by gaining unfettered control over what is properly joint control over the scope of the unit. Such a purpose clearly violates Section 8(a)(5) of the Act. *McQuay-Norris Mfg*., supra; *Hess Oil & Chemical*, supra; *Southland Cork*, supra; *Bozzuto's*, supra; *Idaho Statesman*, supra; *Boise Cascade Corp*., supra; *Standard Register*, supra. In these circumstances it is not necessary to discuss the two cases cited by Respondent, *Storer Communications*, 295 NLRB 72 (1989), affd. sub nom. *Stage Employed IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990), and *Western Newspaper Publishing Co*., 269 NLRB 355 (1984). Suffice it to say that they are readily distinguishable from the facts presented here.

Accordingly, I conclude that Respondent's insistence to impasse over its proposal to change the scope of the bargaining unit violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found Respondent to have engaged in certain violations of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It should be noted here that I find, despite Respondent's denial, that the contract language can be used to describe the appropriate bargaining unit. I further find that at all times the unit was one which was appropriate within the meaning of Section 9(a) of the Act. A nearly identical unit was found appropriate in *Palm Beach Post-Times*, 151 NLRB 1030, 1044 (1965) (''all employees doing composing room work'' as more fully described in the contract). Here, the parties have demonstrated its appropriateness by bargaining in the unit for many years. Moreover, the Board has held similar units appropriate. See *Columbia Tribune Publishing Co*., 201 NLRB 538, 551 (1973), and *Newspaper Printing Corp*., supra at 292, enfd. 625 F.2d 956 (10th Cir. 1980). Accordingly, the affirmative action recommended will require, inter alia, Respondent, on request, to bargain in good faith with the Union in the below-described appropriate bargaining unit, and if an agreement is reached, reduce that agreement to writing and sign it. The bargaining unit is:

> All of Respondent's employees who perform composing room work beginning with the markup of copy and continuing until the material is ready for the printing press (but excluding proofreading).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of Respondent's employees in the following unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act:

> All of Respondent's employees who perform composing room work beginning with the markup of copy and continuing until the material is ready for the printing press (but excluding proofreading).

4. On August 22, 1990, Respondent insisted to impasse on changing the above-described bargaining unit and conditioned a new collective-bargaining contract on the Union's acceptance of those changes. Such conduct is a violation of Section 8(a)(5) and (1) and breaches the good-faith collective-bargaining obligation mandated by Section 8(d) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Bremerton Sun Publishing Co., Bremerton, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Communications Workers of America, Local 14761, affiliated with Communications Workers of America, AFL–CIO, CLC by insisting to impasse on changing the scope of the collective-bargaining unit as a condition for a new collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, collectively bargain in good faith with Communications Workers of America, Local 14761, affili-

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ated with Communications Workers of America, AFL–CIO, CLC in the bargaining unit found appropriate and if an agreement is reached, embody that agreement in a written document and sign it.

(b) Post at its facility in Bremerton, Washington, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''